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CENTRAL DIST. OF CALIF.
LOS ANGELES

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 THE HEBREW UNIVERSITY OF
15 JERUSALEM,
Plaintiff,
16 v.
17 BENEFIT COSMETICS, LLC, and DOES 1
through 10,
Defendant.

PSG
CASE NO. CV 09 08711 PSW (PJWx)

ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIM TO
COMPLAINT

18
19 BENEFIT COSMETICS, LLC.
COUNTER-PLAINTIFF
v.
20 THE HEBREW UNIVERSITY OF
21 JERUSALEM.
COUNTER-DEFENDANT.

22
23 Defendant Benefit Cosmetics, LLC ("Benefit"), by its attorneys, answers the
24 Complaint filed by Plaintiff The Hebrew University of Jerusalem ("HUJ") on
25 November 25, 2009, as follows:

- 26 1. Denies the allegations in paragraph 1.
27 2. Denies that HUJ is the sole and exclusive legal and beneficial owner of
28 the Albert Einstein name, personality, publicity, and trademark rights"; lacks

1 knowledge or information sufficient to form a belief as to the truth of the remaining
2 allegations contained in paragraph 2 and on that basis denies the same.

3 3. Admits the allegations in paragraph 3.

4 4. Admits that HUI purports to assert that this Court has jurisdiction as
5 alleged in paragraph 4 but otherwise denies the allegations contained in paragraph 4.

6 5. Admits only that it regularly does business in the State of California
7 and in this District but otherwise denies the allegations contained in paragraph 5.

8 6. Lacks knowledge or information sufficient to form a belief as to the
9 truth of the allegations contained in paragraph 6 and on that basis denies the same.

10 7. Lacks knowledge or information sufficient to form a belief as to the
11 truth of the allegations contained in paragraph 7 and on that basis denies the same.

12 8. Lacks knowledge or information sufficient to form a belief as to the
13 truth of the allegations contained in paragraph 8 and on that basis denies the same.

14 9. Lacks knowledge or information sufficient to form a belief as to the
15 truth of the allegations contained in paragraph 9 and on that basis denies the same.

16 10. Denies the allegations contained in paragraph 10.

17 11. Lacks knowledge or information sufficient to form a belief as to the
18 truth of the allegations contained in paragraph 11 and on that basis denies the same.

19 12. Lacks knowledge or information sufficient to form a belief as to the
20 truth of the allegations contained in paragraph 12 and on that basis denies the same.

21 13. Lacks knowledge or information sufficient to form a belief as to the
22 truth of the allegations contained in paragraph 13 and on that basis denies the same.

23 14. Lacks knowledge or information sufficient to form a belief as to the
24 truth of the allegations contained in paragraph 14 and on that basis denies the same.

25 15. Lacks knowledge or information sufficient to form a belief as to the
26 truth of the allegations contained in paragraph 15 and on that basis denies the same.

27 16. Admits the allegations in paragraph 16.

28

1 17. Denies that the description set forth in paragraph 17 accurately
2 summarizes the contents of Exhibit B to the Complaint and therefore denies the
3 allegations of paragraph 17 concerning the same and respectfully refers the Court to
4 such exhibit for the contents thereof; admits that the print advertisement attached as
5 Exhibit B to the Complaint was produced by Defendant.

6 18. Denies that the description set forth in paragraph 18 accurately
7 summarizes the contents of Exhibit B to the Complaint and therefore denies the
8 allegations of paragraph 18 concerning the same and respectfully refers the Court to
9 such exhibit for the contents thereof; denies the remaining allegations in paragraph
10 18.

11 19. Admits the allegations in paragraph 19.

12 20. Denies the allegations in paragraph 20, except admits that Benefit has
13 used the advertisement attached as Exhibit B to the Complaint in other media in the
14 United States.

15 21. Denies the allegations in paragraph 21, except admits that Benefit has
16 never entered into a licensing agreement with Plaintiff or Plaintiff's licensing agent.

17 22. Repeats and incorporates by reference its responses to the prior
18 paragraphs of the Complaint as set forth herein.

19 23. Denies the allegations in paragraph 23.

20 24. Denies the allegations in paragraph 24.

21 25. Denies the allegations in paragraph 25.

22 26. Denies the allegations in paragraph 26.

23 27. Denies the allegations in paragraph 27.

24 28. Denies the allegations in paragraph 28.

25 29. Denies the allegations in paragraph 29.

26 30. Denies the allegations in paragraph 30.

27 31. Repeats and incorporates by reference its responses to the prior
28 paragraphs of the Complaint as set forth herein.

1 32. Denies the allegations in paragraph 32.

2 33. Denies the allegations in paragraphs 33, except admits that Benefit used
3 an image and likeness of Albert Einstein without Plaintiff's consent, which was not
4 required by Benefit to do so.

5 34. Denies the allegations in paragraph 34.

6 35. Denies the allegations in paragraph 35.

7 36. Repeats and incorporates by reference its responses to the prior
8 paragraphs of the Complaint as set forth herein.

9 37. Denies the allegations in paragraph 37.

10 38. Denies the allegations in paragraph 38.

11 39. Denies the allegations in paragraph 39.

12 40. Denies the allegations in paragraph 40.

13 **First Affirmative Defense**

14 41. The Complaint fails to state a claim upon which relief can be granted.

15 **Second Affirmative Defense**

16 42. Upon information and belief, Plaintiff did not receive the rights it
17 claims to have received under Albert Einstein's will. As such, its claims fail as a
18 matter of law.

19 **Third Affirmative Defense**

20 43. The Complaint is barred by Plaintiff's own unclean hands and
21 inequitable conduct, including, without limitation, Plaintiff's filing of fraudulent
22 Successor-in-Interest claims with the Secretary of State under Cal. Civ. Code §
23 3344.1, in which Plaintiff asserts ownership of Albert Einstein's right of publicity
24 "by will" when, upon information and belief, Plaintiff knew or should have known
25 at the time it filed such claims that it never received such rights under Mr. Einstein's
26 will.

27

28

1 **Fourth Affirmative Defense**

2 44. The Complaint is barred by Plaintiff's failure to join one or more
3 Required Parties under Federal Rule of Civil Procedure 19, including, without
4 limitation, the co-owners of Albert Einstein's purported post-mortem right of
5 publicity.

6 **Fifth Affirmative Defense**

7 45. The Complaint is barred by the applicable statutes of limitations.

8 **Sixth Affirmative Defense**

9 46. Defendant's use of the Einstein photograph constitutes a parody. As
10 such, its use is a fair use and is protected under the First Amendment to the United
11 States Constitution.

12 **Seventh Affirmative Defense**

13 47. The Complaint and each cause of action and count therein are barred by
14 the doctrine of waiver, acquiescence, estoppel and/or laches.

15 **Eighth Affirmative Defense**

16 48. Various paragraphs of the Complaint do not comply with Fed. R. Civ.
17 P. 8(a) and (e), which require a "short and plain statement of the claim showing the
18 pleader is entitled to relief." As such, Defendant is not required to separately admit
19 or denies each of the allegations contained therein.

20
21 **COUNTERCLAIM**

22 1. Plaintiff and Counterclaim-Defendant The Hebrew University of
23 Jerusalem ("HUI") has filed suit against Defendant and Counterclaim-Plaintiff
24 Benefit Cosmetics, LLC ("Benefit") alleging that Benefit's use of a photograph of
25 Albert Einstein in an advertisement for its "That Gal" brightening face primer
26 product (the "Advertisement") infringes HUI's purported rights under California
27 Civil Code § 3344.1; United States Code, Title 15, Section 1125(a); and California
28 Business & Professions Code § 17200 *et seq.*

1 2. HUI bases its claims on its assertion that it obtained Mr. Einstein's
2 purported post-mortem right of publicity under Mr. Einstein's will.

3 3. Upon information and belief, despite HUI's allegations to the contrary,
4 HUI did not receive any purported post-mortem right of publicity under Mr.
5 Einstein's will.

6 4. In light of HUI's infringement lawsuit, there is a substantial
7 controversy between the parties of sufficient immediacy and reality to warrant the
8 issuance of a declaratory judgment.

9 5. Accordingly, Benefit seeks a declaration, pursuant to 28 U.S.C. § 2201
10 and Federal Rule of Civil Procedure 57, that the Advertisement does not infringe
11 any right of HUI.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Benefit prays for judgment as follows:

14 A. Dismissing HUI's Complaint with prejudice;

15 B. Declaring and adjudging that the Advertisement does not infringe any
16 right of HUI;

17 C. Permanently enjoining HUI from asserting claims or filing actions
18 against Benefit arising out of Benefit's creation and use of the Advertisement;

19 D. Directing HUI to withdraw its Successor-in-Interest claims filed with
20 the Secretary of State of California pursuant to California Civil Code § 3344.1 and
21 any other similar filings made with any State or Federal governmental agency and
22 permanently enjoining HUI from filing any such claims in the future;

23 E. Awarding HUI its costs and attorneys' fees incurred in defending
24 against HUI's Complaint and in bringing its counterclaim, including under Section
25 35(a) of the Lanham Act, 15 U.S.C. § 35(a), and Section 3344.1(a)(1) of the
26 California Civil Code, and as otherwise permitted under law; and
27
28

1 F. Granting Benefit such other and further relief as the Court may deem
2 just and proper.

3
4 DATED: April 23, 2010

YOUNGERMAN & McNUTT LLP

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18 Counsel for Defendant,
BENEFIT COSMETICS, LLC

PROOF OF SERVICE

The Hebrew University of Jerusalem v. Benefit Cosmetics, LLC
U.S. District Court – Central District Case No. CV09-08711 PSG (PJWx)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11150 West Olympic Boulevard, Suite 900, Los Angeles, California 90064.

On April 23, 2010 I served the foregoing document described as **ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM TO COMPLAINT** on the interested parties in this action by placing true copies thereof enclosed in sealed envelope(s) addressed as follows:

Jorge R. Arciniega
Robert M. Pryor
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2049 Century Park East, Suite 3800
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Attorneys for Plaintiff, The Hebrew University of Jerusalem,

☒ (BY MAIL) I caused such envelopes to be deposited in the mail at Los Angeles, California. The envelope(s) were mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 23, 2010, at Los Angeles, California.


KATIE YAMASHITA